CALIFORNIA'S ANTI-SLAPP STATUTE

The last decade of this millennium has seen the emergence in California of a broad and very diverse anti-SLAPP coalition which has won strong legislative protections against SLAPPs, Strategic Lawsuits Against Public Participation. In 1992, the Legislature overwhelmingly enacted California's pioneering anti-SLAPP law, Code of Civil Procedure section 425.16. This law provides an effective vehicle for the identification and dismissal of SLAPPs at an early point in the case, before the litigation can take its full financial and emotional toll.

Since 1993, California's anti-SLAPP law has evolved, faced some judicial resistance, and has been strengthened twice by legislative amendments. While there is still room for improvement in the law, it provides those who exercise their rights to petition the government and speak freely about issues of public concern strong protections from meritless and burdensome litigation.

California's experience in building a strong anti-SLAPP coalition to win and strengthen a powerful anti-SLAPP law can be a useful model for those in other states seeking to do the same, as well as for an effort to win much-needed federal anti-SLAPP legislation.

SLAPPs

In 1988, a major study entitled "Strategic Lawsuits Against Public Participation" was published by University of Denver Professor of Sociology Penelope Canan and Professor of Law George W. Pring, co-directors of the Political Litigation Project at the University of Denver. (35 Social Problems 506.) The study focused on attempts to use civil tort actions to stifle political expression, and introduced the term "SLAPP" into the public lexicon. The study found that while these SLAPPs were rarely successful in court, they were often devastating to the defendants. Plaintiffs could afford the costs of litigation, but the costs of defending such a suit for an individual citizen, financial and emotional, was overwhelming for some SLAPP targets. Thus, Canan and Pring found, SLAPPs have been utilized as an effective way to silence opposing viewpoints. Pring and Canan continued to research and write about SLAPPs for a decade, and they expanded and updated their research in a 1996 book entitled SLAPPs: Getting Sued for Speaking Out (Temple Univ. Press).

SLAPPs often occur in response to political activism, but they occur in other contexts as well. For example, the following acts have all led to retaliatory SLAPPs: filing a lawsuit, speaking out on a public issue, attending a public meeting, complaining to the government, participating in a political rally, protesting, and picketing. Land developers, property managers, corporations, school administrators and teachers, and governmental agencies have all filed meritless SLAPPs. A SLAPP may allege defamation, libel, slander, interference with contract, interference with prospective economic advantage, abuse of process, malicious prosecution, conspiracy, trespass, or other claims.
UNSUCCESSFUL LEGISLATIVE EFFORTS IN 1990 AND 1991

In 1990, then-Senator Bill Lockyer, who is now California’s Attorney General, first introduced an anti-SLAPP bill in the Legislature, SB 2313. Supporters included the Planning and Conservation League (PCL), American Civil Liberties Union (ACLU), California School Employees Association, Land Utilization Alliance, Jewish Public Affairs Committee, and the Sierra Club. The most significant opposition came from the California Building Industry Association (CBIA), which represented developers, who are frequent filers of SLAPPs. Opponents also included the State Bar Committee on the Administration of Justice (CAJ). This bill received overwhelmingly favorable votes in the Assembly (77-0) and in the Senate (29-3). Republican Governor George Deukmejian vetoed the bill at the urging of the CBIA.

Senator Lockyer introduced his anti-SLAPP bill again in 1991, as SB 10. The 1990 supporters of the anti-SLAPP bill were joined in 1991 by the newly-formed California First Amendment Project (predecessor of the California Anti-SLAPP Project), along with many others, including the California Newspaper Publishers Association, California First Amendment Coalition, California Common Cause, Consumers Union, Friends of the River, Golden State Mobilehome Owners League, City and County of Los Angeles, and City of San Diego. The 1991 anti-SLAPP bill also received extensive editorial support from most of the state's major papers, including the Los Angeles Times, San Jose Mercury News, San Diego Union, San Francisco Chronicle, San Francisco Examiner, and Sacramento Bee.

In a brilliant political move, Senator Lockyer merged the anti-SLAPP provisions in SB 10 with another bill of his, SB 341, which would make permanent liability protections (which were about to sunset) for volunteer officers and directors of non-profit organizations. As a result, the merged bill attracted support from many organizations with substantial political clout which supported the bill because of the non-profit provisions, including the California Correctional Peace Officers Association, California Medical Association, California Chamber of Commerce and many local chambers, League of California Cities, California Judges Association, United Way of California, and California Association of Nonprofits.

The opposition was again led by the developers, the CBIA. It was joined again by the State Bar CAJ. The California Trial Lawyers Association (CTLA) also opposed the bill because of the non-profit liability provisions.

Again in 1991, the anti-SLAPP bill received substantial support in the Legislature, passing 38-0 in the Senate and 54-20 in the Assembly (where it was opposed by the Assembly Republican Caucus). Newly-elected Republican Governor Pete Wilson vetoed the bill, again due to strong lobbying by the CBIA. In his veto message, Governor Wilson said that he would have signed the nonprofit provisions into law and he urged Senator Lockyer to decouple them from the anti-SLAPP provisions. At least five newspapers published editorials criticizing Governor Wilson for vetoing the anti-SLAPP bill.
ENACTMENT OF ANTI-SLAPP LAW IN 1992

Ignoring Governor Wilson's request that the two issues be separated, Senator Lockyer introduced an anti-SLAPP bill in 1992, SB 1264, which again included protections for volunteer officers and directors of non-profit corporations. Under the leadership of the California Anti-SLAPP Project, the coalition which had formed in 1991 to support the anti-SLAPP bill continued to work for the bill. Again the coalition included organizations expressly supporting the anti-SLAPP provisions as well as those solely (or more) concerned with the non-profit provisions. And again the bill received widespread editorial support from newspapers throughout the state.

The CBIA continued to lead the opposition to the anti-SLAPP bill in 1992, with the CTLA again opposed because of the non-profit provisions. They were joined by the California Judges Association (switching its position from the previous year), which opposed the bill on the grounds that the anti-SLAPP provisions infringed on the right to a jury trial.

SB 1264 received overwhelming support in both houses of the Legislature, passing 31-0 in the Senate and 68-1 in the Assembly. This time, a combination of the popularity of the bill (including the extensive editorial support for it) and pressure from Governor Wilson's allies and supporters who backed the non-profit provisions, resulted in Governor Wilson signing SB 1264 into law. California's anti-SLAPP law, Code of Civil Procedure section 425.16, became effective on January 1, 1993.

DETAILS OF THE STATUTE'S PROTECTIONS

Under the anti-SLAPP law, as passed in 1992, any cause of action filed against a person that arises from an act in furtherance of the person's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike. Section 425.16(b). The statute covers lawsuits arising from written or oral statements or writings made before a legislative, executive, judicial, or other official proceeding, or made in connection with an issue under consideration or review by any such official body, or made in a public place or forum in connection with an issue of public interest. Section 425.16(e).

Once the defendant (the SLAPP target) shows that the statute applies, the plaintiff (the SLAPP filer) must then establish that there is a "probability" that the plaintiff will prevail on the claim, or the court must dismiss the case. In making its determination, the court is to consider the pleadings and supporting and opposing affidavits. Section 425.16(b).

The filing of a special motion to strike stays all discovery in the case, until notice of entry of the order ruling on the motion, although on noticed motion and for good cause shown, the court may allow specified discovery to be conducted. Section 425.16(g). A SLAPP defendant who prevails on a special motion to strike is entitled to recover attorneys' fees and costs. Section 425.16(c).
EARLY YEARS OF THE STATUTE

Reflecting the California Judges Association’s opposition to the anti-SLAPP bill, some trial court judges appeared hesitant to grant special motions to strike, with the resultant dismissal of the case and mandatory fees to the defendant, preferring instead to allow the lawsuit to proceed to discovery and trial. In addition, during this initial period after the law’s enactment, several Superior Court judges made on-the-record requests for guidance from the appellate courts on the implementation and scope of the anti-SLAPP law.

By September 1994, approximately 18 months after section 425.16 went into effect, at least fifty special motions to strike had been filed in California’s superior or municipal courts. Results were mixed, with only about half of the motions being granted. Courts of appeal also denied at least six petitions challenging trial court denials of special motions to strike.

APPELLATE GUIDANCE: WILCOX V. SUPERIOR COURT

In September 1994, the first published opinion arising from the anti-SLAPP law was issued by the Second Appellate District in Los Angeles. In Wilcox v. Superior Court, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994), court reporters had filed an anti-trust suit against another group of court reporters known as the California Reporting Alliance (CRA) and against various insurance companies, for their practice of “direct contracting.” CRA filed a cross-complaint against plaintiff Sondra Wilcox and others because they had solicited support for the anti-trust lawsuit. Wilcox challenged the cross-complaint as a SLAPP by filing a special motion to strike under section 425.16.

The trial court denied Wilcox’s motion, and she filed a petition for writ of mandate with the court of appeal, which reversed the denial and provided a detailed discussion of SLAPPs and California’s anti-SLAPP statute.

Wilcox addressed several key issues regarding section 425.16. Wilcox noted that the protections of section 425.16 are not limited to oral and written statements, but extend to conduct as well. (Id. at 821.) Wilcox also clarified that it is the defendant’s burden to make a prima facie showing that the anti-SLAPP statute applies — that the lawsuit “arises from” an act of free speech or of petitioning the government. (Id. at 819-821.) Once this showing is made, the burden shifts to the plaintiff, who must present admissible evidence to establish a “probability” that the plaintiff will prevail. If the plaintiff cannot produce such evidence, the SLAPP will be dismissed. Wilcox held that to establish a "probability" of prevailing, the plaintiff need only make a prima facie showing of facts which, if proved at trial, would support a judgment in the plaintiff’s favor, and that the trial court could not weigh the evidence (to avoid infringement of the right to a jury trial). (Id. at 823-825.)

Wilcox’s ruling that the "probability" standard only requires a prima facie showing was contrary to the legislative history of the statute, which makes clear that both supporters and opponents of the anti-SLAPP law understood “probability” to mean that the plaintiff must establish that it is more likely than not to prevail. However, because of judges' concern about the right to jury
trial, Wilcox's interpretation was accepted by subsequent appellate decisions, and has now become fossilized. The judiciary has essentially amended the statute (sub silentio) to enact the jury trial concerns raised by the California Judges Association, even though those concerns were rejected by the Legislature when it overwhelmingly enacted the anti-SLAPP law in 1992.

POST-WILCOX DEVELOPMENTS


Ludwig, 37 Cal. App. 4th at 17, clarified that statements need not be made directly to an official government body to be covered by the anti-SLAPP law. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996), held that the anti-SLAPP law is not limited to tort actions and that the litigation history between the parties is relevant for the court to consider in determining whether the statute applies. Lafayette Morehouse v. Chronicle Publishing Co. [Lafayette Morehouse I], 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995), held that media corporations are "persons" under the anti-SLAPP law and are therefore entitled to its protections.

BROAD VERSUS NARROW CONSTRUCTION

The continued resistance of some judges to the anti-SLAPP statute manifested itself in a dispute about whether the anti-SLAPP law should be broadly or narrowly construed, whether it should cover all petition and petition-related activity, or only such activity that was related to a public issue.

The Wollersheim opinion represented the majority view of the courts, which held that the statute should be broadly construed. Wollersheim held that the anti-SLAPP law protects all petition activity, regardless of subject matter and whether or not it involves a public issue. (42 Cal. App. 4th at 650.) See also Beilenson, 44 Cal. App. 4th at 949; Dove Audio, 47 Cal. App. 4th at 784; Lafayette Morehouse I, 37 Cal. App. 4th at 862-863; Averill, 42 Cal. App. 4th at 1176.
However, Division One of the First Appellate District, based in San Francisco, issued three opinions holding that the anti-SLAPP law was to be applied narrowly, so that petition or petition-related activity would be covered only when the court deems such activity to involve a public issue. *Zhao v. Wong*, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (1996); *Linsco/Private Ledger v. Investors Arbitration Services*, 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (1996); *Briggs v. Eden Council for Hope & Opportunity*, 54 Cal. App. 4th 1237 (1997), rev'd, 19 Cal.4th 1106 (1999).

Another division within the First District was critical of Division One's direction, and held, like *Wollersheim*, that all petition and petition-related activity was covered by the statute, regardless of the issue involved. *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1046-1047, 61 Cal. Rptr. 2d 58 (1997).

**DISCOVERY AND FEES**

The conflict between broad and narrow interpretation of the applicability of the anti-SLAPP statute was also reflected in other issues regarding the interpretation of the statute, particularly regarding discovery and fees.

The statute's automatic stay of discovery upon the filing of a special motion to strike provides an important protection against a debilitating aspect of SLAPPs — the need to invest significant resources responding to plaintiff's discovery. A party may secure relief from the discovery stay only by showing good cause for specified discovery, upon noticed motion. (Section 425.16(g).) Some courts have interpreted this discovery stay broadly. For instance, in *Ludwig*, the court noted that "an overly lenient standard" to allow discovery to proceed "would be wholly inappropriate, given that the statute is intended to 'provid[e] a fast and inexpensive unmasking and dismissal of SLAPPs.' . . . The legislative intent is best served by an interpretation which would require a plaintiff to marshall facts sufficient to show the viability of the action before filing a SLAPP suit." 37 Cal. App. 4th at 16 (emphasis in original).

However, another court insisted on interpreting the discovery stay narrowly and asserted that trial courts must liberally exercise their discretion to allow reasonable and specified discovery timely petitioned for, especially in libel suits against media defendants. *Lafayette Morehouse I*, 37 Cal. App. 4th at 868. As a result of this narrow view of the discovery stay, for instance, the plaintiffs in *Briggs v. ECHO* (see below) were allowed to take 12 depositions as well as require substantial document production before the trial court ruled on ECHO's pending special motion to strike.

Another important provision of the anti-SLAPP statute entitles the defendant prevailing on a special motion to strike to recover attorneys' fees and costs. (Section 425.16(c).) SLAPPs are frequently hotly contested and can result in substantial litigation costs. Some courts have understood that a defendant who gets a SLAPP dismissed under the anti-SLAPP law should be able to recover all such costs that are reasonably incurred. For instance, in *Wollersheim*, 42 Cal. App. 4th at 658-660, the court affirmed an award of all fees sought by the defendant for work in the trial court, in excess of $130,000.
However, the same court that insisted on narrowly interpreting the discovery stay also decreed a narrow construction of the fee provision, holding that under the anti-SLAPP law, a prevailing defendant was allowed to recover attorneys' fees and costs only on the special motion to strike, not the entire suit. *Lafayette Morehouse v. Chronicle Publishing Co. [Lafayette Morehouse II],* 39 Cal. App. 4th 1379, 1383, 46 Cal. Rptr. 2d 542 (1995). In this case, the special motion to strike had only been granted as to one of seven causes of action in the complaint. *Lafayette Morehouse I,* 37 Cal. App. 4th at 861.

However, some trial courts have gone beyond the facts in *Lafayette Morehouse,* and have relied on *Lafayette Morehouse II* in refusing to allow a prevailing defendant to recover fees for work that is reasonably related to the special motion to strike, such as for preparation of the answer.

**THE LEGISLATURE DIRECTS BROAD CONSTRUCTION IN 1997**

To remedy the conflicting broad and narrow interpretations of the anti-SLAPP statute by the courts, the anti-SLAPP coalition, led by the California Anti-SLAPP Project, asked Senator Lockyer to resolve the issue by legislation. Senator Lockyer agreed, and introduced Senate Bill 1296 in 1997. SB 1296 added language to section 425.16(a) to expressly direct that the statute was to be construed broadly. SB 1296 also added a "conduct" category to the definition of acts in furtherance of a person’s right of petition or free speech in new subsection (e)(4), which extended the statute's coverage to include: "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Thus, SB 1296 made clear that the statute was intended to have a broad application and to cover petition and speech conduct as well as written and oral statements.

The 1997 bill was vigorously supported by the anti-SLAPP coalition, whose supporters re-assembled from the campaign to enact the law in 1991-1992. The core coalition members included CASP, CNPA, ACLU, and PCL, who were joined by a new media ally in 1997 — the California Broadcasters Association. In addition, SLAPP defendants and former SLAPP defendants who lived in the districts of key legislators lobbied their representatives, resulting in strong bi-partisan support for the bill. There was no formal opposition to the bill. With no Republican opposition in 1997, SB 1296 was unanimously approved by both the Senate and the Assembly, and was signed into law by Governor Wilson in August 1997.

The legislative direction that the statute be construed broadly creates serious question about the continued viability of the narrow construction of the discovery stay in *Lafayette Morehouse I* and of the attorneys' fee provision in *Lafayette Morehouse II.*


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THE SUPREME COURT WEIGHS IN — BRIGGS v. ECHO

Two days after the 1997 amendment was signed by Governor Wilson, the California Supreme Court agreed to decide its first case under the anti-SLAPP law, Briggs v. Eden Council for Hope & Opportunity [Briggs v. ECHO], 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999). (The court of appeal's narrow construction of the anti-SLAPP law in Briggs was one of the cases that had prompted the 1997 legislative amendment.)

In Briggs, the owners of residential rental properties sued Eden Council for Hope and Opportunity (ECHO), a non-profit corporation which counseled tenants and mediated landlord/tenant disputes. ECHO had counseled some of the plaintiffs' tenants, some of whom prevailed against the plaintiffs in small claims proceedings. Plaintiffs sued ECHO for defamation and intentional and negligent infliction of emotional distress. ECHO filed a special motion to strike under section 425.16, and the trial court granted ECHO's motion, dismissing the SLAPP.

Plaintiffs appealed, and Division One of the First District reversed, in its third published opinion decision narrowly construing the statute. Division One, in a 2-1 decision with a strong dissent by the presiding justice, ruled that the complaint arose from a private dispute, not a public issue, and therefore the anti-SLAPP statute did not apply. Briggs v. ECHO, 54 Cal. App. 4th 1237. ECHO petitioned the California Supreme Court, which granted review.

In January 1999, the Supreme Court reversed the court of appeal's decision, holding that the anti-SLAPP law applied to lawsuits arising from any petition or petition-related activity, whether or not it involved a public issue. The Court based its opinion on the plain language of the statute, as originally enacted and as amended in 1997, on general principles of statutory construction, on the legislative history of the statute, and on public policy considerations. Briggs v. ECHO, 19 Cal. 4th 1106.

In its opinion, the Supreme Court expressly directed that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" Briggs v. ECHO, 19 Cal. 4th at 1119 (quoting Bradbury v. Superior Court, 49 Cal. App. 4th at 1114 n.3. The Supreme Court stated that to the extent that any existing decisions required a finding of a "public issue" for the anti-SLAPP statute to apply to petition or petition-related activity, such opinions — such as Zhao v. Wong and Linseco/Private Ledger v. Investors Arbitration Services — were disapproved. Briggs v. ECHO, 19 Cal. 4th at 1123 n.10.

FURTHER DEVELOPMENT OF THE CASE LAW

In a series of decisions, the courts of appeal provided further guidance regarding the interpretation of the anti-SLAPP law. In Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (1997), the court affirmed the dismissal of a libel action arising out of a campaign flyer in a union election, and rejected the argument that the defendant could not be awarded fees because the fees had been paid by a third party. In Mission Oaks Ranch v. County of Santa Barbara, 65 Cal. App. 4th -92-
713, 77 Cal. Rptr. 2d 1 (1998), a developer filed a lawsuit for damages against the County of Santa Barbara and its environmental consultants regarding a draft environmental report. The court affirmed dismissal of the complaint under the anti-SLAPP law, holding, inter alia, that the lawsuit arose from communications to the government about matters under consideration or review by the government. The court also ruled that the defendants were entitled to recover fees under the anti-SLAPP statute.

In Coltrain v. Shewalter, 66 Cal. App. 4th 94, 77 Cal. Rptr. 2d 600 (1999), the court held that plaintiffs' dismissal of the complaint in the face of a pending special motion to strike created a presumption that the defendants were the prevailing parties for purposes of entitlement to attorneys' fees under the anti-SLAPP law. Taking a somewhat different approach on the same issue, Moore v. Liu, 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807 (1999), held that when the plaintiff has dismissed the complaint and the defendant makes a motion for fees, the trial court must rule on the defendant's special motion to strike, and fees can only be awarded to the defendant if the trial court finds that the defendant's special motion to strike should be granted.

In Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 (1999), the court affirmed the dismissal under the anti-SLAPP law of a defamation action based on a statement by a union organizer to a television reporter regarding a labor dispute. In United States ex. rel Newsham v. Lockheed Missiles & Space Co., 171 F.3d 1208 (9th Cir. 1999), the Ninth Circuit held that the California anti-SLAPP law applied in diversity actions in federal court. The Court ruled that there was no "direct collision" between the anti-SLAPP law and the Federal Rules of Civil Procedure, that there was no indication that the Rules were intended to "occupy the field" with respect to pretrial procedures aimed at weeding out meritless claims, that the anti-SLAPP law was crafted to serve an interest not directly addressed by the Rules (protection of the constitutional rights of petition and speech), that no federal interests would be undermined by the application of the anti-SLAPP law, and that its ruling would discourage forum shopping. The Ninth Circuit's ruling and analysis should be helpful in persuading federal courts throughout the country to apply state anti-SLAPP laws to diversity claims in federal court.

In Sipple v. Foundation for National Progress, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (1999), the court affirmed the dismissal of a defamation action by a nationally known political consultant against Mother Jones magazine, arising from an article about plaintiff's custody dispute which reported testimony by his first and second wives that he had physically and verbally abused them.

**JUDICIAL COUNCIL REPORT REGARDING ANTI-SLAPP MOTIONS**

The Legislature required the Judicial Council of California to submit a report to the Legislature regarding the frequency and the outcome of special motions to strike under the new statute by January 1, 1998. Section 425.16(i). In May 1999, the Judicial Council issued its report, entitled "Legislative Report of Special Motions to Strike Strategic Lawsuits Against Public Participation (SLAPP) - Code of Civil Procedure Section 425.16." (A copy of this report is available free from the Judicial Council office in San Francisco.) The most significant part of the report was
Canan and Pring made seven recommendations for changes to the anti-SLAPP law. These recommendations were (1) add a reporting requirement to enable reliable research on the results of special motions to strike; (2) extend attorneys fees awards to cover all costs that the targets have reasonably incurred in defending the action; (3) control the trial court's discretion regarding the 60-day motion-filing deadline; (4) make an order denying a special motion to strike an appealable order; (5) clarify that the special motion to strike does not apply to "SLAPPbacks" (a suit by the target against the SLAPP filer); (6) control the trial court's ability to lift the stay on discovery that occurs upon filing a special motion to strike; and (7) add new remedies such as sanctions against the filer and the filer's attorneys. Judicial Council Report on SLAPPs, pp. 4-6. The Judicial Council did not support any of Canan and Pring's recommendations, although it stated that clarification regarding the attorneys fees provision would be helpful. Id.

1999 LEGISLATION: AB 1675

In late 1998, the anti-SLAPP coalition, again led by the California Anti-SLAPP Project, approached Sheila Kuehl, chair of the Assembly Judiciary Committee, and asked her to introduce legislation to correct what was then the most significant problem in the anti-SLAPP law. This problem was the severe difficulty which SLAPP defendants had in challenging an adverse trial court decision in the court of appeal, which was an unintended consequence of the "one final judgment rule." Although a SLAPP filer could appeal the dismissal of the complaint as a SLAPP, a SLAPP target could not appeal the trial court's denial of a special motion to strike. Instead, the SLAPP target could only challenge the denial of a special motion to strike by a discretionary petition for writ of mandate, which was disfavored and rarely successful. Thus, the very person intended to be protected by the anti-SLAPP law — the SLAPP target — found it much more difficult to challenge an adverse trial court decision than the person from whom the target was supposed to be protected. This was particularly significant because, even after the 1997 amendment and Briggs v. ECHO, some trial courts still resisted the dismissal of meritless SLAPPs under the anti-SLAPP law.

At the urging of Assemblymember Kuehl, the Assembly Judiciary Committee introduced a bill, AB 1675, to correct this problem. The bill added a new subsection (j) to the statute, making the denial of a special motion to strike an appealable order. It also added a new subsection (k), which required that any party filing or opposing a special motion to strike transmit to the Judicial Council via fax or email a copy of the endorsed-filed caption page of the motion or opposition or any appeal, as well as any orders under the anti-SLAPP law, which documents were to be maintained by the Judicial Council as public records. This would permit the public and the Legislature to assess whether further improvements to the law should be made. Thus, AB 1675 contained two of Pring and Canan's seven legislative recommendations.

The core anti-SLAPP coalition from previous years, consisting of CASP, CNPA, ACLU, PCL, and CBA, came together again behind AB 1675. Important new members also joined this
coalition in 1999, including the League of California Cities and California Labor Federation. New supporters also included the California Employment Lawyers Association, California School Boards Association, and International Longshore & Warehouse Union. There was no formal opposition to the bill.

AB 1675 passed *unanimously* in both houses of the Legislature, and was signed by newly elected Democratic Governor Gray Davis on October 10, 1999. Because it was designated as urgency legislation, it took effect immediately.

THE FUTURE OF THE ANTI-SLAPP LAW IN CALIFORNIA

The unanimous passage of AB 1675 in 1999, on the heels of the unanimous 1997 amendment, demonstrates the strength of California's anti-SLAPP coalition and the Legislature's continuing concern about the use of SLAPPs as a means to chill the fundamental constitutional rights of petition and speech that are so crucial to our system of democratic government.

Future amendments could remove remaining obstacles to the full effectiveness of anti-SLAPP law. Pring and Canan's five remaining recommendations address some of the most common concerns remaining under the anti-SLAPP law, including the scope of the discovery stay and the attorneys' fees provision in the statute.

CONCLUSION

An active and very diverse coalition of anti-SLAPP advocates and supporters has been built during this decade, and it continues to grow and expand. This coalition has won the enactment and strengthening of a strong anti-SLAPP law which has resulted in important protections for First Amendment rights. Those in other states can find useful lessons from the success of California's coalition and the anti-SLAPP law which it has won.

For additional information on SLAPPs, including information for SLAPP targets and the full text of the newly-amended anti-SLAPP law, as well as a more complete list of members of the anti-SLAPP coalition in California, please visit the California Anti-SLAPP Project's website at www.casp.net.
STATE ANTI-SLAPP STATUTES

By David Heller¹

¹ David Heller is a Staff Attorney with the Libel Defense Resource Center, Inc. LDRC Fellow Elizabeth Read assisted in the preparation of this article.
STATE ANTI-SLAPP STATUTES

I. AN OVERVIEW OF ANTI-SLAPP STATUTES

Anti-SLAPP statutes have made slow but steady progress in state legislatures around the country this past decade. Starting in the late 1980’s, and continuing throughout the 1990’s, fourteen states enacted anti-SLAPP legislation: Washington in 1989; California in 1992; Delaware in 1992; New York in 1992; Minnesota in 1993; Rhode Island in 1993; Nevada in 1993; Massachusetts in 1994; Nebraska in 1994; Georgia in 1996; Tennessee in 1997; Maine in 1998; Indiana in 1998; and Louisiana in 1999. The key features and interpretations of these state laws (other than California) are examined in section II below.

Over the last two years, at least ten other states — Florida, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Oregon, Pennsylvania, Texas and Utah — considered but ultimately failed to enact anti-SLAPP legislation. If the legislative history of California’s statute is any guide, in the decade ahead supporters of legislation will likely continue to push for enactment in some, if not all, of these states. Moreover, as in California, anti-SLAPP bills may draw the support of a wide range of groups, including unions, professional organizations, environmental groups, legal rights organizations, and press organizations, making it likely that bills will be raised in other state legislatures.

These numbers show a definite trend, albeit perhaps a cautious one, toward such statutes, but they are not uniform in language and so they differ in scope and application. From a media practitioner’s standpoint the statutes have been of mixed utility. California is clearly in the vanguard in extending the concept of “strategic lawsuit against public participation” beyond the narrowest scope of the SLAPP scenario, such as claims arising out of zoning or land use disputes, to the far larger realm of commentary on matters of public interest which is, in large part, the currency of the media.

A. JUDICIAL INTERPRETATIONS

Recently, a California federal district court applying the state’s statute dismissed a defamation suit brought by Metabolife, the maker of a controversial nutritional supplement, against a Boston television station that broadcast an investigative report into the safety of the product. Metabolife International, Inc. v. Wornick, Blackburn & Hearst-Argyle Television, Inc., Civ. No. 99-1099-R (S.D. Cal. Nov. 16, 1999). The news report was, according to the court a “public contribution” to the debate over the safety of Metabolife, slip op. at 3, and the broadcast was “undoubtedly a public forum” within the meaning of the statute. Id. at 7-8. Thus all eleven claims based on statements in the broadcast questioning the safety of the supplement were dismissed.

Using the anti-SLAPP statute, the defendants obtained a dismissal on facts which might, in
other jurisdictions, suggest lengthier proceedings. Moreover, under the statute, the defendants are entitled to recover reasonable attorney's fees and costs, making this the latest in a series of results that will put the statute to the fore in defending media defamation cases in California in the decade ahead, if it is not there already.

In contrast, Washington's anti-SLAPP statute, the first one enacted in the country, applies narrowly only to protect good faith communications of complaints and information to government agencies. See II. N. below. By its terms, the statute does not apply to the media and there are few reported cases concerning the statute. See also II. M. discussing Tennessee's statute which is similar in scope.

Most other state statutes are of slightly broader scope but have had, up to now, limited or no application to the media. As in California, the initial judicial interpretations seem to be conservative. New York's statute, for example, applies to persons who are sued for reporting on, commenting on, challenging or opposing the applications of "public applicants and permittees." See II. K. below. The statute could reasonably be construed to apply to comments made to or in the press, although the language is not a model of clarity. Perhaps also because of this, one of the first courts to construe the language, held the statute to be in derogation of the common law and required that the defendant have "directly challenge[d] a license or permit application" in order for the statute to apply. Harfenes v. Sea Gate Ass'n, 647 N.Y.S.2d 329 (Sup. Ct. N.Y. Co. 1995). More recent cases have liberalized this requirement slightly. One court found the statute could apply to statements made to the press because "[i]f a 'public applicant or permittee' is permitted to bring a baseless suit against an opponent for statements made in the press, the chilling effect on the public debate will be just as great — if not greater — than a suit based on statements made directly to the government. Adelphi University v. Committee to Save Adelphi, N.Y.L.J., Feb. 6, 1997 at 33 (Sup. Ct. Nassau. Co. 1997).

Also of note is a recent New York decision which seems to stretch the definition of "public applicant" to give effect to the spirit of the statute, despite the instruction in Harfenes that it be narrowly construed. Street Beat Sportswear v. National Mobilization of Sweatshops, (Sup. Ct. N.Y. Co. Oct. 29, 1999) (clothing manufacturer's tortious interference suit against garment workers and Asian American Legal Defense and Education Fund based on, inter alia, protest rallies and press conferences). Here the court found the plaintiff clothing manufacturer to be a "public applicant" because, as part of the apparel industry, it was subject to state oversight with regard to labor law compliance. Looking at the "larger picture," including labor complaints filed against plaintiff by some of the defendants, the court observed that "even under a narrow construction, this lawsuit has all the earmarks of a SLAPP suit" — despite there being no "direct challenge" to a license or permit application as described in Harfenes. Yet to be seen is whether the press will put this statute to the test in its litigation and the extent to which it will be found to apply to publishing activities.

The Delaware and Nebraska statutes also employ "public applicant" language but there appear to be no reported cases interpreting these statutes. See II. A. and I. below.

The Massachusetts statute seems on its face to apply broadly. It applies to claims brought against a person's exercise of the right of petition under the federal and/or state constitutions. The
right of petition is defined to include statements made directly to governmental bodies and also “any statement reasonably likely to encourage consideration or review of an issue” by any governmental body and “any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition.” M.G.L. c. 231, § 59H. See II. G. below.

The Massachusetts Supreme Judicial Court held, however, that the statute can be applied only in instances where the petitioning activity was the sole basis for the plaintiff’s lawsuit making it, perhaps, impossible to extend protection to statements by the press that are intended, in whole or part, to impart information to the public. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161, 691 N.E.2d 935, 940 (1998) (“The typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects.”).

Also of interest is the judicial interpretation of Minnesota’s statute. See II. H. below. The statute applies to claims that materially relate to an act of the moving party that involve public participation. Minn. Stat. §554.02 Subd. 1. Lawful conduct or speech that is genuinely aimed in whole or part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of constitutional rights. § 554.03. In the first decision to apply the statute, a trial court interpreted its scope broadly, holding that it applied to a television station’s hidden camera investigation into conditions at a facility for the mentally retarded. See Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct. App. 1998) (affirming decision below). But the court went on to make it quite easy for the plaintiff to meet its burden of showing that the defendant was stripped of the statute’s protections as a tortfeasor. The appellate court held that “[a]t this early stage of the proceedings, we assume that [plaintiffs] have met their burden if they have presented clear and convincing evidence on the elements of their claims.” Id. at 792 (citing cases applying standard for granting motions for leave to amend complaint and to plead punitive damages).

B. SIMILARITIES

Despite the differences in statutory language, these statutes do share a common theoretical basis and, often, similar mechanisms of relief. The theoretical basis generally follows the work of Professors George Pring and Penelope Canan who coined the “SLAPP” acronym as shorthand for their research into lawsuits filed to inhibit people who take part in the “process of government.” See generally G. W. PRING & P. CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996). This can be seen in the preambles or legislative findings sections of many of the statutes. The preamble to Washington’s statute states, in part, that “the threat of a civil action for damages can act as a deterrent to citizens who wish to report information” to the government. Wash. Ann. 4.24.500. Georgia’s statute states that “rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process.” O.C.G.A. 9-11-11.1(a). Louisiana’s statute, the most recently enacted law, states, in part, that “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights
of freedom of speech and petition for redress of grievances.” 971 Section 2.

As a mechanism, these statutes provide up-front relief in the form of an immediate motion to
dismiss or for summary judgment. All the statutes, except for those in Minnesota, Rhode Island,
Tennessee and Washington, provide that the motion be heard on an expedited basis. Most also
specifically stay discovery, except for good cause shown by plaintiff. And all provide for the recovery
of costs and attorney’s fees. A majority of the statutes shift the burden of proof to plaintiff once the
statute is shown to apply. New York, for example, requires that the motion “shall be granted unless
the party responding to the motion demonstrates that the action has a substantial basis in law.” N.Y.
C.P.L.R. 3211(g) (McKinney 1999).

Applying the more expansive California statute in Metabolife, the court held that plaintiff had
to establish its case with competent and admissible evidence. Under this standard, the court required
plaintiff to produce sufficient evidence of falsity, having limited discovery to this issue. This allowed
the court to review plaintiff’s scientific evidence which the court found to be unreliable and
inadmissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and
therefore insufficient to support its claim. Metabolife, supra, slip op. at 12-20.

Whether other states will adopt or move toward the California model is an interesting question
to be played out over the next decade. Even in their more limited applications, these other state
statutes provide a great service in protecting people from lawsuits filed to intimidate or punish them
for exercising their “right to petition and free speech.” In fact, the commonly thought of targets of
SLAPP suits, such as community organizations, are a much more vulnerable class than the media.

The extension of anti-SLAPP protection to the larger realm of commentary on matters of
public interest, as has clearly been the case in California, is completely consistent with the theory of
anti-SLAPP protection. Although the resources of many of the media may be larger than community
groups, or other common SLAPP suit victims, the media is no less the frequent target of defamation
suits intended to punish or deter public commentary and criticism, as demonstrated in the Metabolife
case. In fact, there the court noted that the plaintiff also “wrote letters to media companies designed
to deter similar broadcasts on the safety concerns surrounding Metabolife.” Id. at 4. Moreover, the
distinction between “the media” and community groups may fade in the decades ahead with the
potential for exponentially more Internet publishers.

Interestingly, the latest anti-SLAPP statute in the country (Louisiana) is based on California’s
law. It would be nice to categorize this development as a trend toward California-style protection
but the sui generis legislative history argues against this. According to Louisiana media counsel, the
motivating force behind the new statute was a single state legislator who found himself a defendant
in a SLAPP suit. His research into the subject led him to the California statute which he was able to
import into Louisiana’s Code of Civil Procedure without apparent controversy.
C. Lessons from the California Model

While the Louisiana statute may nevertheless prove as successful as in California, it is worthwhile to reflect on California's extended legislative history for lessons on how its successes may be duplicated elsewhere. Several factors stand-out.

- A broad coalition of supporters lobbied for legislation and persisted in overcoming initial legislative defeats. This support also helped see through later amendments to explicitly provide that the statute be construed broadly and that denials of motions to strike be appealable. Similar support in other states would be a vehicle for enacting new laws and amending existing ones.

- The statute was aggressively litigated. Narrow judicial interpretations were consistently tested, promoting expansion in the law. This was helped along by a dedicated organization, the California Anti-SLAPP Project, but in at least one known instance (and there are probably more) California media lawyers took on a case pro bono because it presented an opportunity to argue that the statute applied in a diversity action in federal court. This suggests, first, that media counsel familiarize themselves with anti-SLAPP statutes and legislative initiatives in their states; and, second, that they invoke the statute in appropriate cases to push for advances. Moreover, the California statute should be a used as a model by supporters of anti-SLAPP legislation.

- Finally, California's statute was never promoted as a press bill. It was sold, in essence and accurately, as a bill that strengthens participatory democracy by protecting everyone's right to speak out on matters of public concern. Coming out of a decade where more and more courts cast a skeptical eye at the doings of the press, there is perhaps the lesson here that a persuasive argument in the media context is that the First Amendment simply serves everyone's right to speak out.

II. A Review of the State Statutes

A. Delaware


1. Scope. Delaware's statute applies to claims brought by public applicants or permittees that are materially related to any efforts on the part of the defendant to report on, rule on, challenge or oppose applications or permission for zoning changes, leases, licenses, certificates or other entitlement for use or permission to act from any government body. §8136(1). A public applicant or permittee is defined as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body or any person with an interest, connection, or affiliation with such person that is materially related to such application or permission." §8136(2)

2. Burden. The movant has the burden of demonstrating that the action or claim involves public petition and participation. §8137. If the statute is shown to apply, on motions to
dismiss or for summary judgment the respondent must show that the action has a substantial basis in law or is supported by a substantial argument for an extension of law. *Id.* Further, in order for a plaintiff to recover damages in an action involving public petition and participation, he or she must prove actual malice. §8136(b).

3. *Relief.* Motions to dismiss or for summary judgment under the statute are given preference. §8137. The movant may recover costs, attorneys' fees and compensatory damages. §8138. Punitive damages are available if the lawsuit was commenced for the purpose of harassing, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights. *Id.*

4. *Relevant case law.* None reported.

**B. CALIFORNIA**


For a discussion of the California anti-SLAPP statute see Mark Goldowitz, *California’s Anti-SLAPP Statute*, pages 83-98, supra.

**C. GEORGIA**


1. *Scope.* Georgia's statute applies to any claim against a person that arises from an act that "could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the [federal and/or state constitutions] in connection with an issue of public interest or concern." §9-11-11.1(b). This is defined as "any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." §9-11-11.1(c).

2. *Burden.* Burden of proof is not addressed in the statute.

3. *Relief.* Discovery and pending hearings or motions are stayed upon the filing of a motion under the statute. §9-11-11.1(d). The motion must be heard within thirty days of service barring exigent circumstances. *Id.* The statute expressly authorizes the court to sanction the party that brought the claim or the party's attorney, or both, by ordering the payment of defendant's attorney's fees and other expenses. §9-11-11.1(b). Effective July 1, 1998, §9-11-11.1 was amended to permit the recovery of attorney's fees even in the event a party bringing the SLAPP action
dismisses it in response to a motion brought under the statute. §9-11-11.1(f) (permitting application for attorneys fees “not later than 45 days after the final disposition, including but not limited to dismissal by the plaintiff, of the action”).

4. **Relevant case law.** In the first Georgia appellate case to interpret the anti-SLAPP statute, the court affirmed the dismissal of a developer’s suit against a resident of a subdivision who opposed the developer’s efforts to rezone adjacent property by circulating petitions, writing letters to county officials and speaking before a local planning commission. *Providence Construction Co. v. Bauer*, 229 Ga. App. 679, 494 S.E.2d 527 (Ga. App. 1997) (affirming dismissal of breach of contract and tortious interference claims). The statute’s application to the media has not yet been judicially interpreted by a Georgia appellate court, but the law would appear to include news stories relating to issues undergoing government review.

D. **INDIANA**

*Indiana Code §34-7-7-1 - §34-7-7-10 Enacted 1998.*

1. **Scope.** Indiana’s statute applies to claims brought against a person’s acts in furtherance of the right of petition or free speech under the federal and/or state constitutions in connection with a public issue or an issue of public interest arising after June 30, 1998. §34-7-7-1. Such acts are defined as any conduct in furtherance of the exercise of the constitutional right of petition, or free speech, in connection with a public issue or an issue of public interest. §34-7-7-2.

2. **Burden.** The movant must show by a preponderance of evidence that the complained-of act is a lawful act in furtherance of the right of petition and free speech. §34-7-7-9(d). The movant must state with specificity the public issue or issue of public interest that prompted his activity. §34-7-7-9(b).

3. **Relief.** Discovery in the action is stayed except for discovery relevant to the motion. §34-7-7-6. The hearing and decision on the motion are expedited. If successful, the movant is entitled to recover reasonable attorney’s fees and costs. If the motion under the statute was frivolous or solely to cause delay, the plaintiff is entitled to recover attorney’s fees and costs. §34-7-7-9.

4. **Relevant case law.** None reported.

E. **LOUISIANA**

*Code Civil Procedure Article 971 Enacted 1999. (The Louisiana statute is based on California’s anti-SLAPP law.)*
1. **Scope.** The Louisiana statute applies to actions "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue." 971 A. (1). This is defined to include, but not be limited to, statements made before government proceedings; statements made in connection with issues under review of government agencies; statements made in a public forum in connection with an issue of public interest; and any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. 971 F. (1) (a)-(d).

2. **Burden.** The respondent must establish "a probability of success on the claim." 971 A. (1).

3. **Relief.** Discovery is stayed, except on motion for good cause. 971 D. The hearing on the motion is expedited. 971 C. The prevailing defendant is entitled to recover reasonable attorney's fees and costs. 971 B.

4. **Relevant case law.** No cases.

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**F. Maine**


1. **Scope.** Maine's statute applies to claims brought against a person's exercise of the right of petition under the federal and/or state constitutions. "Exercise of right of petition" is defined as "any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body; or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government."

2. **Burden.** The respondent must show that the movant's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.

3. **Relief.** Upon the filing of the special motion, all discovery is stayed, although the court may order specified discovery for good cause. Special motion to dismiss to be "heard and determined with as little delay as possible." If the motion is granted, the court may in its discretion award costs and attorney's fees. The State Attorney General may intervene to support the movant on the motion.
4. **Relevant case law.** In the first significant decision under the Maine statute, a superior court dismissed conspiracy, fraud and “failure to warn” claims against a group of lobbyists, petroleum trade associations and spokespersons who had given testimony at public hearings extolling the virtue of a fuel additive. *Millett v. Atlantic Richfield Company, et al.,* No. CV-98-555 (Cumberland County 1999). In a twist to the usual SLAPP scenario, the plaintiffs were self-styled environmental advocates. They argued that the statute did not apply to large corporate defendants or alternatively that the defendants’ petitioning activity was motivated by profit not “truth.” The court held that the plain language of the statute does not limit its application to certain classes of defendants. Moreover, the court held that motive is irrelevant to whether activity is protected under the statute.

G. **Massachusetts**

*M.G.L. c. 231, § 59H Enacted 1994.*

1. **Scope.** Massachusetts’ law applies to claims brought against a person’s exercise of the right of petition under the federal and/or state constitutions. The right of petition includes statements made directly to governmental bodies and also “any statement reasonably likely to encourage consideration or review of an issue” by any governmental body and “any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition.”

2. **Burden.** Motion shall be granted unless the responding party shows that (1) the movant’s exercise of the right to petition had no “reasonable factual support or arguable basis in law”; and (2) the movant’s acts caused actual injury to the responding party. See G.4., below, discussing impact of *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935 (1998).

3. **Relief.** Discovery is stayed pending consideration of the motion. The motion should be heard expeditiously. If granted, the movant shall recover costs and reasonable attorney’s fees.

4. **Relevant case law.** In *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935 (1998), the Massachusetts Supreme Judicial Court held that the statute can constitutionally be applied only in instances where the petitioning activity was the sole basis for the plaintiff’s lawsuit. According to the court, to construe it more broadly would deprive plaintiffs of their constitutional right to seek legal redress. Thus, the court held that for the statute to apply the movant must show that the claims against it are based on “the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.” *Id.* at 167-68, 691 N.E.2d at 943.

*Duracraft* arguably limits the applicability of the statute in defamation cases. Citing
to Duracraft, the court in O'Neil v. Gilvey, 9 Mass. L. Rptr. 237 (Suffolk Co. Superior Court 1999), refused to dismiss a defamation case based on a complaint filed with a government agency. In O'Neil, a Boston City Councilor brought a defamation claim against a city employee who made a report accusing him of sexual harassment. While the court agreed that the report constituted petitioning activity under the statute, the complaint's allegation that the report was false and malicious was a substantial basis, other than petitioning activity, for the suit. The court noted that "it is not the petitioning but the defamation that drives Councilor O'Neil's lawsuit." Id. at 239.

On the other hand, in a more typical SLAPP scenario involving a developer and protesting condominium residents, a court dismissed libel and slander claims. Office One, Inc. v. Lopez, 1998 Mass. Super. LEXIS 573 (Norfolk 1998). The court found that the defendants' alleged defamatory statements, signs and leaflets were all made in the context of opposing plaintiff's efforts to purchase condominium units, thus satisfying the Duracraft requirement that the claim be based on petitioning activity alone. In Boston Mortgage Group, Inc. v. New Boston Mortgage Corp., 9 Mass. L. Rptr. 545 (Middlesex Co. Superior Court 1999), the court, applying the anti-SLAPP statute, dismissed a defendant's counterclaim for defamation where the alleged defamation was published only in the complaint.

A few trial court level cases, pre-Duracraft, discussed the applicability of the anti-SLAPP statute to suits involving the media. In Thomson v. Town of Andover Board of Appeals, 4 Mass. L. Rptr. 411 (Essex Co. Superior Court 1996), the court found that citizens were engaged in protected petitioning activity when their letters of complaint about an industrial site were published in the Boston Globe. The court reasoned that "writing letters to the editor of a newspaper falls under the protection of the [statute] if the letters are statements that are 'reasonably likely to encourage consideration or review' by the government, or 'reasonably likely to enlist public participation'; reasoning which may not withstand the stricter Duracraft test. On the other hand, the statute has been found to be inapplicable to a defendant newspaper that was merely reporting on citizen's petitioning activities. Genovese v. Gazette Publications, 7 Mass. L. Rptr. 353 (Norfolk Co. Superior Ct. 1997). The court found that newspaper was not involved "in communicating with the government about a matter of public concern." Interestingly, Duracraft held that there is no public concern requirement in the statute. Duracraft, supra, at 163-64, 691 N.E.2d at 941.

H. MINNESOTA

Minn. Stat. §§554.01 - 554.05 Enacted 1994.

1. Scope. Minnesota's statute applies to claims that materially relate to an act of the moving party that involves public participation. § 554.02 Subd. 1. Lawful conduct or speech that is genuinely aimed in whole or part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of constitutional rights. §554.03. The statute does not apply to claims solely seeking injunctive relief.

2. Burden. The responding party has the burden of proof on the motion, the
court shall grant the motion unless the responding party produces clear and convincing evidence that
the acts of the moving party are not immunized by the statute. §554.02 Subd. 2 (2)-(3). The moving
party has the burden of proof on the separate petition under the statute for actual or punitive damages
and must show that the respondent brought the action for the purpose of harassment or to otherwise
wrongfully injure the movant. §554.04 Subd. 2(a).

3. Relief. Discovery is stayed except for good cause shown. §554.02 Subd. 2 (1). The court shall award
the moving party who prevails reasonable attorney’s fees and costs
associated with bringing the motion. §554.04 Subd. 1. The moving party may also petition the court
for actual and punitive damages. §554.04 Subd. 2(a). The State Attorney General or relevant
government agency may intervene on the movant’s behalf. §554.02 Subd. 2(4). The statute also
provides that a person sued in federal court may bring an action under the statute in state court to
recover damages. §554.045

4. Relevant case law. In the first decision to apply the statute, a trial court held
that it applied to a television station’s hidden camera investigation into conditions at a facility for the
mentally retarded, but the court went on to find that plaintiffs met their burden on the motion of
proving by clear and convincing evidence that defendants’ conduct was tortious and therefore not
immune from liability. Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct.
App. 1998). The court held that “[a]t this early stage of the proceedings, we assume that [plaintiffs]
have met their burden if they have presented clear and convincing evidence on the elements of their
claims.” Id. at 792 (citing cases applying standard for granting motions for leave to amend complaint
and to plead punitive damages).

One silver lining to this case was a previous decision of the Minnesota Supreme Court
that held that defendants had “a right to directly appeal the order of the district court” denying their
motion under §§ 554.01-.02. Special Force Ministries v. WCCO Television, 576 N.W.2d 746 (Minn.
1998).

I. NEBRASKA


1. Scope. Nebraska’s statute applies to claims brought against public petition
and participation — defined as an action for damages brought by “a public applicant or permittee”
that is “materially related to any efforts of the defendant to report on, comment on, rule on, challenge,
or oppose [an] application or permission.” §25-21, 242 (1). A public applicant or permittee is
defined as “any person who has applied for or obtained a permit, zoning change, lease, license,
certificate, or other entitlement for use or permission to act from any government body or any person
with an interest, connection, or affiliation with such person that is materially related to such
application or permission.” §25-21, 242 (4).

2. Burden. In a motion to dismiss pursuant to §25-21,245, or in a motion for
summary judgment pursuant to §25-21,246, the movant has the burden of demonstrating that the underlying action is one involving public petition and participation. Upon that showing, the respondent must demonstrate that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension of existing law. If the defendant to the underlying suit seeks damages pursuant to § 25-21,243, the burden is on her to demonstrate the applicable standard of fault (see below).

3. **Relief.** Expedited hearing on the motion to dismiss or for summary judgment. §§25-21,245-246. The statute also authorizes a motion to recover damages, including attorney’s fees. Costs and attorney’s fees may be recovered if the defendant shows that the action was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension of existing law. §25-21, 243. Compensatory damages may be recovered upon a showing that the underlying action was “commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of [petition and speech] or association rights.” § 25-21, 243 (1).

4. **Relevant case law.** None reported.

J. NEVADA


1. **Scope.** The Nevada statute immunizes from civil liability persons who “engage in good faith communication in furtherance of the right to petition,” defined as communication that is aimed at procuring any governmental or electoral action, result or outcome; communication of information or a complaint to a government entity or employee regarding a matter of concern to them; and statements made in direct connection with an issue under consideration by a government body, or any other official proceeding, that is truthful or made without knowledge of falsity. § 41.637, 41.650.

2. **Burden.** Not addressed in the statute.

3. **Relief.** Discovery is stayed and the court is to rule on the motion 30 days after it is filed. §41.660. If successful, the movant shall recover reasonable costs and attorney’s fees. §41.670(1). The statute also provides that the movant may bring a separate action for compensatory, punitive damages and attorney’s fees and costs of bringing the separate action. §41.670(2). The State Attorney General or other state agency may provide for the defense of an action covered by the statute. §41.660.

4. **Relevant case law.** None reported.
K. NEW YORK

NY Civil Rights Law §§ 70-a, 76-a, Civil Practice Law & Rules §3211(g), §3212(h). Enacted 1992.

1. Scope. New York's anti-SLAPP statute is spread somewhat awkwardly between a substantive addition to the state's Civil Rights Law and amendments to the state's procedural law governing motions to dismiss and for summary judgment. The substantive portion of the statute applies to actions involving public petition and participation brought by a public applicant or permittee that is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission. § 76-a 1(a). “Public applicant or permittee” is defined as “any person who has applied for a permit, zoning change, lease, license, or other entitlement from a government body, or any person with an interest, connection, affiliation with such person that is materially related to such application or permission.” § 76-a 1(b).

2. Burden. In moving to dismiss or for summary judgment, the movant has the burden of showing that the underlying suit fits into §76-a’s definition of “action involving public participation.” C.P.L.R. §§3211(g), 3212(h). Upon such a showing, in order to survive the motion, the respondent must demonstrate that the action has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. Id. For a plaintiff to recover damages in an action involving public participation, he or she must establish by clear and convincing evidence that any communication giving rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, when the truth of the communication is material to the cause of action. § 76-a 2.

3. Relief. The court shall grant preference in the hearing of such motions. C.P.L.R. §§3211(g), 3212(h). Costs and attorney's fees may be recovered if the movant demonstrates that the action involving public participation was commenced or continued without a substantial basis in fact and law and no reasonably based argument of existing law could support it. §70-a(a). See also West Branch Conservation Ass'n, Inc. v. Planning Board of Clarkstown, 636 N.Y.S.2d 61 (2d Dep't 1995) (award of attorney’s fees under the statute is discretionary). Compensatory damages may be recovered if the movant demonstrates that the action was commenced or continued to harass or otherwise maliciously inhibit the free exercise of speech, petition or association rights. §70-a(b). Punitive damages may be recovered upon an additional demonstration that the action was commenced and continued solely to harass, intimidate, punish or otherwise maliciously inhibit the free exercise of speech, petition or association rights.

4. Relevant case law. In one of the first reported decisions under the statute, a trial court dismissed an action by individual homeowners to recover damages from a homeowners' association, the homeowners alleging that the association had previously subjected them to a SLAPP suit based on the homeowners' attempt to obtain information from the association. Harfenes v. SeaGate Ass'n, 647 N.Y.S.2d 329 (Sup. Ct. N.Y. Co. 1995). In declining to apply the statute, the court held that it is in derogation of the common law and must be narrowly construed. Therefore it required that the movant “must directly challenge a license or permit application in order to establish
a cause of action.” *Id.* at 333.

More recently, however, three other trial courts have taken a more expansive view of the statute without specifically repudiating *Harfenes* by moving away from the requirement that the movant “directly challenge a license or permit application in order to establish a cause of action.” In *Adelphi University v. Committee to Save Adelphi*, N.Y.L.J., Feb. 6, 1997 at 33 (Sup. Ct. Nassau Co. 1997), a trial court denied a motion by plaintiffs in a libel suit to dismiss the defendants’ SLAPP counterclaim; at issue in the suit were statements made by the defendant to governmental authorities as well as to various media; the court found that the SLAPP statute can extend to statements made to the press. Another trial court held that a defamation defendant, both as a citizen and as an employee of a non-profit social services organization, was within the scope of the statute. *Rubin v. Gitlitz*, No. 44912/97 (Sup. Ct. Kings Co. July 28, 1998). In what appears to be the first dismissal of a defamation claim under the New York statute, the court granted the defendant’s motion to dismiss a defamation claim based on accusations that defendant made defamatory remarks about plaintiff to nursing home residents.

Most recently a trial court held that a clothing manufacturer’s suit for tortious interference against a group of protesting garment workers and a legal rights organization was within the scope of the statute. *Street Beat Sportswear v. National Mobilization of Sweatshops* (Sup. Ct. N.Y. Co. Oct. 29, 1999) (complained of conduct included protests and press conferences). The court found the plaintiff to be a “public applicant” because, as part of the apparel industry, it was subject to state oversight with regard to labor law compliance. Looking at the “larger picture,” including labor complaints filed against plaintiff by some of the defendants, the court observed that “even under a narrow construction, this lawsuit has all the earmarks of a SLAPP suit” - despite there being no “direct challenge” to a license or permit application as described in *Harfenes*.

**L. RHODE ISLAND**


1. **Scope.** Rhode Island’s statute applies to claims brought against a party “based on said party’s lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island Constitutions in connection with a matter of public concern.” §9-33-2(a). This is defined as statements made to a legislative, executive, or judicial body, or any other governmental proceeding, statements made in connection with an issue under consideration or review by a governmental proceeding, or any statement made in connection with an issue of public concern. §9-33-2 (e). The statute specifically exempts “sham” petitioning and free speech, defined as activities that are not genuinely aimed at procuring favorable government action, result or outcome. §9-33-2 (1) - (2).

2. **Burden.** Not addressed in the statute.

3. **Relief.** Discovery is stayed. §9-33-2(b). If the movant prevails, the court shall
award costs and reasonable attorney’s fees. §9-33-2(d). The court shall award compensatory
damages and may award punitive damages if the respondent’s claims were frivolous or were brought
with an intent to harass or otherwise inhibit movant’s right to petition and free speech. §9-33-2(d).
The State Attorney General or other governmental agency may intervene on the movant’s behalf.
§9-33-3.

4. Relevant case law. The statute’s constitutionality was upheld by the Supreme
See also Cove Road Development v. Western Cranston Industrial Park Associates, 674 A.2d 1234
(R.I. 1996) (discussing the constitutional right to seek redress of grievances).

M. TENNESSEE


1. Scope. Tennessee’s statute immunizes from civil liability any person who in
furtherance of their right of free speech or petition under the state and federal constitutions in
connection with a public or governmental issue, communicates information to any government agency
regarding a matter of concern to that agency. § 4-21-1003(a). The statute does not apply where the
communication is made with actual malice, or with negligence if the information pertains to a private
figure. § 4-21-1003(b)(1)-(3).


3. Relief. If the defendant successfully raises the defense, she is entitled to
reasonable costs and attorney’s fees incurred in establishing the defense. Also, the agency to which
the subject communication was made, or the state attorney general, can intervene to raise the defense.
If a governmental agency is successful in asserting the defendant’s immunity from suit, it will receive
attorney’s fees and costs. If the agency is unsuccessful, the plaintiff will receive attorney’s fees and
costs incurred in proving the defense was inapplicable or invalid.

4. Relevant case law. None reported.

N. WASHINGTON


1. Scope. Washington’s statute immunizes from civil liability a person “who in
good faith communicates a complaint or information to any agency of federal, state, or local
government regarding any matter reasonably of concern to that agency” and is a defendant in a claim
based on that communication. §4.24.510.
2. **Burden.** Burden of proof is not addressed in the statute but see N. 4. below.

3. **Relief.** The successful movant shall recover costs and reasonable attorneys' fees incurred in establishing the defense. The state attorney general or the agency to which the communication was made can intervene on behalf of defendant, and will likewise recover costs and attorney's fees if successful. If the agency is unsuccessful, the plaintiff will be entitled to its costs in proving the defense inapplicable or invalid.

4. **Relevant case law.** In *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 698, *rev. denied*, 125 Wn. 2d 1010 (1994), the court held that where a defendant in a defamation action claims immunity under the statute on the grounds that the communications to a public officer were made in good faith, the burden is on the plaintiff to show by clear and convincing evidence that the movant did not act in good faith.